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In The  
**Supreme Court of the United States**  
October Term, 1996

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AMCHEM PRODUCTS, INC., et al.,  
*Petitioners,*  
vs.

GEORGE WINDSOR, et al.,  
*Respondents.*

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On Writ Of Certiorari To The  
United States Court Of Appeals  
For The Third Circuit

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**BRIEF OF AMICUS CURIAE NATIONAL  
ASSOCIATION OF SECURITIES AND  
COMMERCIAL LAWYERS (NASCAT)  
IN SUPPORT OF PETITIONERS**

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CLINTON A. KRISLOV  
ROBERT J. STEIN, III  
KRISLOV & ASSOCIATES LTD.  
222 North LaSalle Street  
Suite 810  
Chicago, IL 60601-1086  
  
MERN HORAN  
Executive Director  
NASCAT  
317 Massachusetts Ave., N.E.  
Suite 200  
Washington, DC 20002

KEVIN P. RODDY  
*Counsel of Record*  
MILBERG WEISS BERSHAD  
HYNES & LERACH LLP  
355 South Grand Avenue  
Suite 4170  
Los Angeles, CA 90071  
Telephone: 213/617-9007

Counsel for *Amicus Curiae*  
December 16, 1996

38 P/P

**QUESTION PRESENTED**

When the parties to a putative class action enter into a settlement, must the district court nevertheless pretend that every legal and factual issue will be contested, and ignore the existence of the settlement, in determining whether class certification is appropriate under Rule 23 of the Federal Rules of Civil Procedure.

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**BRIEF OF AMICUS CURIAE  
NATIONAL ASSOCIATION OF SECURITIES  
AND COMMERCIAL LAWYERS (NASCAT)  
IN SUPPORT OF PETITIONERS**

The National Association of Securities and Commercial Law Attorneys (NASCAT), by its Counsel of Record and pursuant to Supreme Court Rule 37.3, hereby files its *amicus curiae* brief in support of Petitioners.<sup>1</sup> For the reasons stated herein, the decision of the court below should be reversed.<sup>2</sup>

**I. INTEREST OF AMICUS CURIAE**

NASCAT is an association of law firms and attorneys who litigate class action cases involving antitrust, commercial, consumer, employee (and retiree) benefit, environmental and securities fraud claims in federal and state courts. NASCAT's members frequently represent victims of corporate abuse, schemes to defraud and so-called "white collar" criminal activity. In class actions challenging such wrongdoing, NASCAT's members not only seek compensation for victims, but also attempt to deter wrongdoers, modify corporate behavior and improve the access of victims to justice. As part of these efforts, NASCAT advocates the enactment and enforcement of effective state and federal laws to prevent wrongful,

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<sup>1</sup> Pursuant to Rule 37.3(a), NASCAT has lodged with this *amicus curiae* briefs consent letters signed by Counsel of Record for Petitioners and Respondents.

<sup>2</sup> The Third Circuit's decision is reported as *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610 (3d Cir.), cert. granted, 117 S. Ct. 379 (1996).

fraudulent, deceptive and manipulative business practices. NASCAT and its members also support the practical and utilitarian construction and application of Rule 23 of the Federal Rules of Civil Procedure (and its state law equivalents) in class action litigation.<sup>3</sup>

Over the past thirty years, NASCAT's members have litigated and settled literally hundreds of class action lawsuits<sup>4</sup> filed in federal and state courts under Rule 23 (or its

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<sup>3</sup> NASCAT has previously filed *amicus curiae* briefs in this Court in a variety of contexts. See, e.g., *Grimmett v. Brown*, No. 95-1722 (RICO); *Varity Corp. v. Howe*, 116 S. Ct. 1065 (1996) (ERISA); *BMW of N. Am. v. Gore*, 116 S. Ct. 1589 (1996) (punitive damages); *Curtiss-Wright Corp. v. Schoonejongen*, 115 S. Ct. 1223 (1995) (ERISA); *Plaut v. Spendthrift Farm*, 115 S. Ct. 1447 (1994) (securities fraud); *Gustafson v. Alloyd Co.*, 115 S. Ct. 1061 (1995) (securities fraud); *Boca Grande Club v. Florida Power & Light*, 114 S. Ct. 2703 (1994) (settlement - contribution); *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164 (1994) (securities fraud); *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993); *Musick, Peeler & Garrett v. Employers Ins.*, 508 U.S. 286 (1993) (securities fraud); *Reves v. Ernst & Young*, 507 U.S. 170 (1993) (RICO); *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992) (RICO).

<sup>4</sup> "The class action was an invention of equity . . . mothered by the practical necessity of providing a procedural device so that mere numbers would not disable large groups of individuals, united in interest, from enforcing their equitable rights nor grant them immunity from their equitable wrongs." *Montgomery Ward & Co. v. Langer*, 168 F.2d 182, 187 (8th Cir. 1948). Class actions long have been part of American jurisprudence and for more than a century this Court has held that they were authorized by the equity rules in suits involving members of a class so numerous that it was impracticable to join them all as parties. See, e.g., *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921). In *Smith v. Swormstedt*, 57 U.S. (16 How.) 288 (1854), this Court allowed a representative suit to be brought on

state court equivalents)<sup>5</sup> in virtually every substantive area of the law. NASCAT's members frequently bring securities fraud class actions under the Securities Act of 1933 and/or the Securities Exchange Act of 1934 and our collective experience has demonstrated that the class action "is the primary vehicle through which shareholders seek to vindicate their rights against allegedly fraudulent corporate conduct."<sup>6</sup> Courts and commentators have uniformly

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behalf of all the preachers in the Methodist Episcopal Church South seeking a declaration of the respective rights of each sectional group of the Methodist Episcopal Church of the United States to funds originally belonging to the entire church. This Court found that both groups of litigants had a "common interest" or "common right" to the assets in question, and equated that common interest, and the adequacy of representation signified by it, with the binding effect of the decree. *Id.* at 303. Despite the lack of notice and opportunity to be heard for many class members, this Court found the basic procedural conditions to bringing a class action to have been satisfied, thereby placing its imprimatur on the binding class action. *Id.* at 302-03.

<sup>5</sup> As originally adopted in 1938, Rule 23 represented "a bold and well-intentioned attempt to encourage more frequent use of class actions." 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure: Civil 2d* § 1752, at 15 (1986). Its provisions were completely rewritten and augmented in 1966. *Id.*, § 1753 at 41.

<sup>6</sup> Stephen E. Morrissey, Note, *State Settlement Class Actions That Release Exclusive Federal Claims: Developing a Framework for Multijurisdictional Management of Shareholder Litigation*, 95 Colum. L. Rev. 1765, 1765 (1995) ("Morrissey, *State Settlement Class Actions*"). In the securities fraud context, the class action mechanism is seen as particularly appropriate for two reasons: "first, the alleged misconduct on the part of the defendant company's officers and directors is often the same from the standpoint of each individual shareholder; second, with small

lauded the class action as an important and effective tool in enforcing the federal securities laws.<sup>7</sup>

In order to resolve complex securities fraud (and other types of) class actions involving multi-million dollar claims being litigated on behalf of thousands of geographically diverse class members, NASCAT's members have filed so-called "settlement class actions" (similar to the litigation and settlement at issue in this case) or, to effectuate a settlement agreement with defendants, have agreed to seek certification of a "settlement class."<sup>8</sup> As a

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losses spread among large numbers of shareholders, the class mechanism is perhaps the only means through which shareholder litigation is economically viable." *Id.* at 1765 n.1 (citing Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. Chi. L. Rev. 1 (1991)).

<sup>7</sup> See, e.g., *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 764-68 (1975) (Blackmun, J., dissenting); John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 Colum. L. Rev. 669, 678-83 (1986) (noting "obvious" advantages of the class action mechanism); 7B Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure: Civil 2d* § 1781, at 28 (1986) ("Because most securities cases involve hundreds or thousands of class members who typically possess only small individual claims, the class action provides a useful mechanism for enforcing the policies underlying the securities laws and should be liberally allowed.") (footnote omitted).

<sup>8</sup> See, e.g., *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liability Litig.*, 55 F.3d 768 (3d Cir.) ("GM Trucks") (holding that settlement class actions are cognizable under Rule 23 but setting aside settlement in question due to the district court's failure to make requisite Rule 23 findings), *cert. denied*,

result of their collective experience, NASCAT's members believe that (1) settlement classes may be properly used to facilitate settlement of complex litigation; (2) Rule 23 permits settlement class actions to be brought by claimants and permits settlement classes to be certified by the district courts; (3) the district courts may properly use the fact of settlement to determine that the requirements of Rule 23 have been met in a particular case; and (4) settlement classes are properly used to resolve complex cases where they are subject to the district court's review of the fairness and adequacy of the settlement. See Part III.A-D, *infra*.

In this case, which involves the settlement of a nationwide class action encompassing hundreds of thousands of individual asbestos claims and settlement payments worth more than \$1 billion, the Third Circuit invalidated the settlement agreement, holding that where the parties to a putative class action enter into a settlement, the district court must act as if the settlement does not exist and apply Rule 23's class certification criteria

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116 S. Ct. 88 (1995); *In re Drexel Burnham Lambert Group*, 960 F.2d 285 (2d Cir. 1992) (affirming district court's certification of settlement class and subclasses and approving settlement agreement), *cert. dismissed*, 506 U.S. 1088 (1993); *In re Prudential Sec., Inc. Ltd. Partnerships Litig.*, 163 F.R.D. 200 (S.D.N.Y. 1995) (certifying settlement class and approving settlement providing \$100 million recovery in RICO class action involving 700 limited partnerships and 100,000 investors); *Klein v. McDonnell Douglas Corp.*, Case No. 4:95-CV-02225 TCM (E.D. Mo. Feb. 9, 1996) (certifying settlement class and approving settlement providing lifetime supplemental pension benefits worth \$450+ million in ERISA health care benefits class action involving 24,000 retirees).

"as if the case were going to be litigated." *Georgine*, 83 F.3d at 624 (citing *GM Trucks*, 55 F.3d at 799-800).<sup>9</sup> In its opinion, the court below acknowledged that "the better policy may be to alter the class certification inquiry to take settlement into account," but asserted that "the current Rule 23 does not permit such an exception." 83 F.3d at 618.<sup>10</sup> In so holding, the court below refused to follow reported decisions from the Second, Fifth, Eighth, Ninth and Eleventh Circuits, all of which have relied on the fact of settlement in applying Rule 23's requirements and certifying settlement classes in numerous cases.

NASCAT and its members respectfully submit that the decision of the court below ignores the letter and well-recognized practical construction of Rule 23, the collective experience of the federal courts in reviewing proposed settlements under Rule 23(e), as well as the "'strong judicial policy that favors settlements.'" *In re Pacific Enters. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995)

<sup>9</sup> See also *Georgine*, 83 F.3d at 626 (holding that "the rule in this circuit is that settlement class certification is not permissible unless the case would have been 'triable in class form'" and that "the Rule 23(a) requirements of commonality, typicality, and adequacy of representation, and the Rule 23(b)(3) requirements of predominance and superiority . . . must be satisfied without taking into account the settlement, and as if the action were going to be litigated") (emphasis added) (quoting and citing *GM Trucks*, 55 F.3d at 799).

<sup>10</sup> In *GM Trucks*, 55 F.3d at 798, the Third Circuit acknowledged that other courts of appeals uniformly take the existence of settlement into account in finding that Rule 23's requirements had been satisfied and upholding class certification, but it stated that it "disagree[d] with this approach." *Id.* at 799. See also Part III.C, *infra*.

(citation omitted). As a practical matter, the Third Circuit's decision in this case means that complex class action cases arising in that circuit cannot be easily settled but, rather, must be litigated for years at a cost of millions of dollars, to the collective detriment of claimants, defendants and the courts.

Given the frequency of its use in a wide variety of class actions, this case presents an appropriate occasion for this Court to hold that "settlement classes" and "settlement class actions" are authorized by Rule 23. This Court should endorse the approach utilized by a majority of the courts of appeals (and the greater number of district courts) and hold that the fact of settlement should be taken into account by trial and appellate courts in applying Rule 23's requirements. Because the Third Circuit refused to do so in this case, NASCAT and its members agree with Petitioners that the decision of the court below should be reversed.

## II. ARGUMENT

### A. Settlement Class Actions And Settlement Classes Are Properly Used To Facilitate Settlement Of Complex Litigation

As this Court has recognized, settlement is the principal means of resolving civil litigation in the federal courts. See *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 114 S. Ct. 1461, 1469 n.22 (1994) (observing that "[l]ess than five percent of cases filed in federal court end in trial" and that "the bulk of nontrial terminations reflect settlements"). Given this reality, the federal courts have

adhered to "the strong judicial policy that favors settlements, particularly where complex class action litigation is concerned." *Class Plaintiffs v. Seattle*, 955 F.2d 1268, 1276 (9th Cir.), cert. denied, 506 U.S. 953 (1992).<sup>11</sup> In the words of the court below, a "settlement class" is a procedural device

whereby the court postpones formal class certification until the parties have successfully concluded a settlement. If settlement negotiations succeed, the court certifies the class for settlement purposes only and sends a combined notice of the commencement of the class action and the settlement to the class members. By

<sup>11</sup> Accord *GM Trucks*, 55 F.3d at 805 (noting "the growing frequency of the settlement of increasingly large claims through the class action device" and the fact that "[c]ourts undertaking the special role of supervising class action settlements are apparently heeding the public policy in favor of settlement, and acknowledging the urgency of this policy in complex actions that consume substantial judicial resources and present unusually large risks for the litigants"); *Pacific Enters.*, 47 F.3d at 378 ("When reviewing complex class action settlements, we have a 'strong judicial policy that favors settlements.'") (quoting *Class Plaintiffs*, 955 F.2d at 1276); *In re School Asbestos Litig.*, 921 F.2d 1330, 1333 (3d Cir. 1990) (referring to "our policy of encouraging settlement of complex litigation that otherwise could linger for years") (citations omitted); *Air Line Stewards & Stewardesses Ass'n v. Trans World Airlines*, 630 F.2d 1164, 1166-67 (7th Cir. 1980) ("Federal courts look with great favor upon voluntary resolution of litigation through settlement. . . . This rule has particular force regarding class action lawsuits."), *aff'd*, 455 U.S. 385 (1982); *Prudential*, 163 F.R.D. at 209 ("It is well established that there is an overriding public interest in settling and quieting litigation, and this is particularly true in class actions.") (citing, *inter alia*, *In re Michael Milken & Assocs. Sec. Litig.*, 150 F.R.D. 46, 53 (S.D.N.Y. 1993)).

conditionally certifying the class for settlement purposes only, the court allows the defendant to challenge class certification in the event that the settlement falls apart.

*Georgine*, 83 F.3d at 625 n.9.<sup>12</sup> The "settlement class" (or "settlement class action"), which has been successfully employed by class action claimants and defendants for more than two decades,<sup>13</sup> "now has become commonplace in the federal courts" as a means of resolving complex cases.<sup>14</sup> As a result, the *Manual for Complex Litigation*

<sup>12</sup> See also *GM Trucks*, 55 F.3d at 786; *In re Del-Val Fin. Corp. Sec. Litig.*, 162 F.R.D. 271, 273 n.3 (S.D.N.Y. 1995); Roger C. Cramton, *Symposium: Individualized Justice, Mass Torts, and "Settlement Class Actions": An Introduction*, 80 Cornell L. Rev. 811, 823 (1995) ("settlement class action" refers to a class action "that is designed to be settled rather than litigated, with the defendant not objecting to certification of the class providing the settlement is approved"); Morrissey, *State Settlement Class Actions*, 95 Colum. L. Rev. at 1766 (in settlement class actions, "a class is certified 'for settlement purposes only' at the instance of the litigants' counsel, who often have prearranged the terms of settlement"); William W. Schwarzer, *Symposium: Settlement of Mass Tort Class Actions: Order out of Chaos*, 80 Cornell L. Rev. 837, 840-41 (1995) (same).

<sup>13</sup> See Comment, *Developments in the Law - Class Actions*, 89 Harv. L. Rev. 1318, 1555 n.105 (1976) ("Developments") (listing settlement class cases from as early as 1971).

<sup>14</sup> Note, *Back to the Drawing Board: The Settlement Class Action and the Limits of Rule 23*, 109 Harv. L. Rev. 828, 831 n.27 (1996) ("Note, Back to the Drawing Board") (citing John C. Coffee, Jr., *Class Action Wars: The Dilemma of the Mass Tort Class Action*, 95 Colum. L. Rev. 1343, 1378 n.123 (1995) ("Settlement class actions are not only common, but in some district courts appear to constitute the majority of certified class actions.")). For additional commentary on settlement class actions, see Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 Nw. U. L.

§ 30.45 (3d ed. 1995) ("MCL 3d") recognizes that "courts permit the use of settlement classes" involving the certification of the class "for settlement purposes only," and "permit defendants to settle while preserving the right to contest the propriety and scope of the class allegations if the settlement is not approved." *Id.* at 243. "The costs of litigating class certification are saved and litigation expense is generally reduced by an early settlement." *Id.*<sup>15</sup>

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Rev. 469, 472 (1994), and Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 Cornell L. Rev. 941, 961-62 (1995).

<sup>15</sup> There are numerous reported cases in which district courts have certified settlement classes in securities fraud class actions. *See, e.g., Harden v. Raffensperger, Hughes & Co.*, 933 F. Supp. 763, 768 (S.D. Ind. 1996) (approving settlement of securities fraud class action and certifying settlement class); *Del-Val*, 162 F.R.D. at 273 n.3 (numerous courts have used their discretion to issue orders conditionally certifying classes for purposes of facilitating settlements). *See also In re Kendall Square Research Corp. Sec. Litig.*, 869 F. Supp. 53, 54 (D. Mass. 1994); *Wells v. Dartmouth Bancorp, Inc.*, 813 F. Supp. 126, 130 (D.N.H. 1993); *Balsam v. Eastchester Fin. Corp.*, [1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) 96,900 (E.D.N.Y. 1992); *In re Farmers Group Stock Options Litig.*, [1991-1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) 96,522 (E.D. Pa. 1991); *In re Businessland Sec. Litig.*, [1991 Transfer Binder] Fed. Sec. L. Rep. (CCH) 96,059 (N.D. Cal. 1991); *Cagan v. Anchor Sav. Bank FSB*, [1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) 95,324 (E.D.N.Y. 1990); *Sanders v. Robinson Humphrey/American Express, Inc.*, [1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) 95,315 (N.D. Ga. 1990); *Moorhead v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) 94,448 (D. Minn. 1989); *Alvarado Partners, L.P. v. Mehta*, 723 F. Supp. 540, 545-46 (D. Colo. 1989); *Behrens v. Wometco Enters., Inc.*, 118 F.R.D. 534, 537 (S.D. Fla. 1988), *aff'd*, 899 F.2d 21 (11th Cir. 1990); *Mashburn v. National*

As the Third Circuit acknowledged in *GM Trucks*, 55 F.3d at 793, "resistance to more flexible applications of Rule 23 has diminished over time," *id.*, as the federal courts (and many commentators) have recognized the benefits of settlement classes and settlement class actions. As the court elaborated in that case:

The evolution of the reception accorded settlement classes has manifested itself in the successive versions of the Manual for Complex Litigation. The first edition of the Manual criticized the initiation of settlement negotiations before certification, and discouraged all such negotiations. *See* MCL 1st § 1.46. The second edition recognizes the potential benefits of settlement classes but still cautioned that "the court should be wary of presenting the settlement to the class." MCL 2d § 30.45 at 243. The (draft) third version acknowledges that "settlement classes offer a commonly used vehicle for the settlement of complex litigation" and aims only to supervise rather than discourage their use.

*Id.* at 793-94.

In complex cases – whether the action involves a mass tort or an alleged scheme to violate the federal securities laws – the settlement class action permits litigants to use the courts to overcome collective action

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*Healthcare, Inc.*, 684 F. Supp. 660, 665 & n.4, 675 (M.D. Ala. 1988); *In re Wicat Sec. Litig.*, 671 F. Supp. 726, 730 (D. Utah 1987); *In re First Commodity Corp. Customer Accounts Litig.*, 119 F.R.D. 301, 308 (D. Mass. 1987); *Bush v. Rewald*, [1986-1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) 92,999 (D. Haw. 1986).

problems that often preclude settlement.<sup>16</sup> In *GM Trucks*, the Third Circuit expressly recognized the utility of the settlement class action in complex cases:

The use of settlement classes can thus enable both parties to realize substantial savings in litigation expenses by compromising the action before formal certification. Through settlement class certification, courts have fostered settlement of some very large, complex cases that might otherwise never have yielded deserving plaintiffs any substantial remuneration.

55 F.3d at 790 (citing 2 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* § 11.09, at 11-13 (3d ed. 1992)). Thus, as the Third Circuit made clear in that opinion, the federal courts' recognition and utilization of settlement classes have dramatically increased the number of actions that are amenable to settlement by increasing the rewards of a negotiated settlement by (1) increasing a defendant's incentive to settle because the settlement would bind the members of the class and prevent further lawsuits against the defendant; (2) reducing litigation costs by permitting

<sup>16</sup> See Roger H. Transgrud, *Joinder Alternatives in Mass Tort Litigation*, 70 Cornell L. Rev. 779, 835 (1985) ("Transgrud, *Joinder Alternatives*") (in complex cases, use of a settlement class can help overcome certain elements of these actions that otherwise can considerably complicate efforts to settle, including "the large number of individual plaintiffs and lawyers; . . . the existence of unfiled claims by putative plaintiffs; and . . . the inability of any single plaintiff to offer the settling defendant reliable indemnity protection"); Bruce H. Neilson, *Was the 1966 Advisory Committee Right?: Suggested Revisions of Rule 23 to Allow More Frequent Use of Class Actions in Mass Tort Litigation*, 25 Harv. J. Legis. 461, 480 (1988) (same).

defendants to stipulate to class certification without forfeiting any legal arguments against certification if settlement negotiations fail; (3) reducing differences among class members, thereby making class certification more likely and increasing the value of the settlement to the defendant; and (4) reducing the likelihood of a successful challenge to the class-wide settlement. *GM Trucks*, 55 F.3d at 790-91.

"In sum, settlement classes clearly offer substantial benefits." *Id.* at 792. As set forth below, their long-standing use in the federal courts represents a well-justified practical construction and application of Rule 23 and their validity should be recognized by this Court.

#### **B. Rule 23 Permits Settlement Class Actions To Be Brought By Claimants And Permits Settlement Classes To Be Certified By The Trial Courts**

Although settlement classes are not specifically authorized by Rule 23, they are not specifically precluded by it either. See 2 *Newberg on Class Actions* § 11.27, at 11-44; *Del-Val*, 162 F.R.D. at 273 n.3. After surveying numerous lower court decisions and commentary, in *General Motors* the Third Circuit expressly held that settlement classes are cognizable under Rule 23. 55 F.3d at 792-94. As that court recognized, the judicial authority to establish settlement classes springs, at least in part, from Rule 23(d), which provides that the trial court may make "appropriate orders" determining the course of proceedings. See *In re Baldwin-United Corp.*, 105 F.R.D. 475, 478-79

(S.D.N.Y. 1984) (Rule 23(d) authorizes the creation of "tentative," "provisional," or "conditional" classes).<sup>17</sup>

Alternatively, Rule 23(c)(1), which authorizes the trial courts to enter "conditional" orders, provides additional authority for the settlement class. See *GM Trucks*, 55 F.3d at 792-93.<sup>18</sup> As the Third Circuit has observed, "no court of appeals that has had the opportunity to comment on the propriety of settlement classes has held that they constitute a per se violation of Rule 23." *Id.* at 794 (citing

<sup>17</sup> See also *GM Trucks*, 55 F.3d at 792 (discussing Rule 23(d) and concluding that "[w]e believe that the 'provisional' or 'conditional' conception of the settlement class device finds at least a colorable textual basis in the Rule") (footnotes omitted); *South Carolina Nat'l Bank v. Stone*, 749 F. Supp. 1419, 1428 (D.S.C. 1990) ("It is clear that the Court may provisionally certify the Class for settlement purposes."); 7B Charles A. Wright, *et al.*, § 1791, at 286-88 (analyzing Rule 23(d)); Note, *Back to the Drawing Board*, 109 Harv. L. Rev. at 834-36 (same).

<sup>18</sup> See also *In re Beef Indus. Antitrust Litig.*, 607 F.2d 167, 177 (5th Cir. 1979) ("Rule 23 does not deal specifically with a tentative settlement class. 'However, a tentative class would appear to be a form of conditional certification, sanctioned by Rule 23(c)(1).'" (quoting *Developments*, 89 Harv. L. Rev. at 1357 n.111); *Del-Val*, 162 F.R.D. at 273 n.3 ("Although Rule 23 does not expressly authorize the 'settlement class' device, a number of courts have used their discretion to issue an order conditionally certifying a class for purposes of facilitating settlement."); 2 *Newberg on Class Actions* § 11.27, at 11-55 (Rule 23(c)(1) "authorizes a class ruling to be altered or amended by the court at any time before a judgment on the merits" and such "procedure has been used in the context of a class redefinition for settlement purposes"); Transgrud, *Joinder Alternatives*, 70 Cornell L. Rev. at 835 ("[I]f conditional certification of the case as a common question class action for settlement purposes would enhance the prospects for a group settlement, then Rule 23 authorizes certification.").

Second, Third, Fifth, Seventh and Ninth Circuit decisions).<sup>19</sup>

Therefore, in accordance with the unanimous weight of authority, this Court should recognize that settlement classes are authorized by Rule 23 because "[s]uch construction affords considerable economies to both the litigants and the judiciary and is also fully consistent with the flexibility integral to Rule 23." *Id.*; see also *In re Chambers Dev. Sec. Litig.*, 912 F. Supp. 822, 832-33 (W.D. Pa. 1995).<sup>20</sup>

<sup>19</sup> In addition, numerous district courts have certified settlement classes in securities fraud class actions. See, e.g., *Prudential*, 163 F.R.D. at 205 (certifying settlement class and approving \$100 million settlement in RICO class action involving 700 limited partnerships and 100,000 investors; "The settlement class device has been recognized throughout the country as the best, most practical way to effectuate settlements involving large numbers of claims by relatively small claimants."); *Chatelain v. Prudential-Bache Sec.*, 805 F. Supp. 209, 214 (S.D.N.Y. 1992) (certifying settlement class); *In re Drexel Burnham Lambert Group*, 130 B.R. 910, 912, 918-24 (S.D.N.Y. 1991) (court "certified temporarily, and for settlement purposes only, a mandatory non-opt-out class of all securities litigation claimants . . . and two mandatory, non-opt-out subclasses" and subsequently certified the classes in conjunction with approval of the settlement, analyzing the pertinent requirements of Rule 23), *aff'd*, 960 F.2d 285, 290-92 (2d Cir. 1992), *cert. dismissed*, 506 U.S. 1088 (1993).

<sup>20</sup> The Advisory Committee is in the process of considering modifications to Rule 23 and has proposed authorizing certification of settlement classes that need not meet the requirements of Rule 23(b)(3). See *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227 (9th Cir. 1996); Fed. R. Civ. P. 23(b)(4) (Draft Aug. 15, 1996); Lorna G. Schofield, *Proposed Amendments Offer an Efficient Next Step in Class Action Management* 22 Litigation News

**C. The Trial Courts May Properly Use The Fact Of Settlement To Determine That The Requirements Of Rule 23 Have Been Met**

This case presents an unreconcilable conflict between the court below and every other circuit court to address the Question Presented: Whether the trial court must ignore the existence of the settlement in determining whether Rule 23's requirements have been satisfied. As noted above, the Third Circuit held in this case that the requirements of Rule 23(a)(1)-(4) and (b)(3) "must be satisfied *without taking into account the settlement*, and as if the action were going to be litigated." *Georgine*, 83 F.3d at 626 (emphasis added) (citing *GM Trucks*, 55 F.3d at 799). This holding is in stark contrast to the rule followed in every other circuit court to consider this question.

Thus, in *In re Asbestos Litig.*, 90 F.3d 963 (5th Cir. 1996), which affirmed approval of a "global settlement"

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1, 5 (ABA Section of Litigation Nov. 1996) (proposed Rule 23(b)(4) provides that a class action may be maintained if the requirements of Rule 23(a) are met and the parties to a settlement request certification under Rule 23(b)(3) for purposes of settlement, even though the requirements of subdivision (b)(3) might not be met for purposes of trial); Samuel Estreicher, *Foreword, Federal Class Actions After 30 Years*, 71 N.Y.U. L. Rev. 1, 6 & n.26 (1996) (same); Edward H. Cooper, *Rule 23: Challenges to the Rulemaking Process*, 71 N.Y.U. L. Rev. 13 (1996) (discussing proposed changes to Rule 23); William W. Schwarzer, *Structuring Multiclaime Litigation: Should Rule 23 Be Revised?*, 94 Mich. L. Rev. 1250 (1996) (same); Note, *Back to the Drawing Board*, 109 Harv. L. Rev. at 842, 844-45 (observing that "either the Supreme Court must address the issue directly, or the advisory committee must alter Rule 23," and offering proposed Rule 23(f)).

of asbestos-related personal injury and death claims worth \$1.535 billion, intervenors who were opposed to the settlement argued in the appellate court that the trial court had erred by "considering the circumstances surrounding the settlement and the evidence adduced at the fairness hearing in making findings under Rule 23(a)." *Id.* at 975. Stating that "[t]his argument is contrary to Fifth Circuit precedent and would require a court to ignore important and relevant information that sits squarely in front of it when deciding whether to certify a settlement class," *id.* (emphasis added),<sup>21</sup> and observing that "[m]ost circuits to decide the issue have held that courts should consider the settlement in determining whether Rule 23 prerequisites are satisfied," *id.*,<sup>22</sup> the Fifth Circuit flatly

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<sup>21</sup> In *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195 (5th Cir.), *aff'd*, 659 F.2d 1322 (5th Cir. 1981), *cert. denied*, 456 U.S. 998, and *cert. denied*, 456 U.S. 1012 (1982) ("*Container I*"), the Fifth Circuit held that the district court should consider the settlement in deciding whether the settlement class satisfied the prerequisites of Rule 23. 643 F.2d at 211. The court rejected a challenge to the district court's finding that the class was adequately represented (as required by Rule 23(a)(4)) and found that the terms of the settlement were virtually important to the determination that certification was appropriate. *Id.* The Fifth Circuit followed this precedent in *Asbestos Litig.*, 90 F.3d at 975.

<sup>22</sup> In its opinion, see *Asbestos Litig.*, 90 F.3d at 975, the Fifth Circuit cited cases from the Second, Fourth, Eighth and Eleventh Circuits. See *Malchman v. Davis*, 761 F.2d 893, 900 (2d Cir. 1985) (certification appropriate in settlement of class action antitrust suit because "the interest of the members of the broadened class in the settlement agreement were commonly held, and there is therefore no basis for disturbing the district court's finding on adequacy of representation") (emphasis added); *In re A.H. Robins Co., Inc.*, 880 F.2d 709, 740 (4th Cir. 1989) (affirming settlement approval and class certification in

rejected the approach followed by the Third Circuit in this case:

Only the Third Circuit has refused to look at settlements before it when deciding class certification issues and even that court admits that taking the settlement into account may be "the better policy." *Georgine v. Amchem Products, Inc.*, [83 F.3d 610, 617-18 (3d Cir. 1996)]. *The rule that a court should consider a proposed settlement, if one is before it, when deciding certification issues makes good sense. Settlements and the events leading up to them add a great deal of information to the court's inquiry and will often expose diverging interests or common issues that were not evident or clear from the complaint. See Herbert Newberg & Alba Conte, 2 Newberg on Class Actions § 11.28 at 11-58 (3d ed. 1992) (in settlement class context, common issues arise from the settlement itself).*

We are bound to follow *Container I's* holding that the district court *can and should look at the terms of a settlement in front of it as part of its certification inquiry. We would adopt this rule even if we were not bound by precedent because it*

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products liability class action; "If not a ground for certification *per se*, certainly settlement should be a factor, and an important factor, to be considered when determining certification. That is all the District Court did in this case. Its action in considering the circumstance would appear to have been appropriate."); *White v. National Football League*, 41 F.3d 402, 408 (8th Cir. 1994) ("The adequacy of class representation . . . is ultimately determined by the settlement itself.") (citing *Container I*, 643 F.2d at 212), *cert. denied*, 115 S. Ct. 2569 (1995); *In re Dennis Greenman Sec. Litig.*, 829 F.2d 1539, 1543 (11th Cir. 1987) ("[I]n assessing the propriety of class certification, the courts evaluate the negotiation process and the settlement itself.").

*enhances the ability of district courts to make informed certification decisions.*

*Asbestos Litig.*, 90 F.3d at 975 (emphasis added; citation omitted). As noted above (*see note 22, supra*), the Fifth Circuit's approach has been followed in every other circuit to consider the issue, save the Third Circuit. *See, e.g., Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982); *Beef Indus.*, 607 F.2d at 173-78; *DeBoer v. Mellon Mortg. Co.*, 64 F.3d 1171, 1174-75 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 1544 (1996); *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 633 (9th Cir. 1982).

#### **D. Settlement Classes Are Properly Used To Resolve Complex Cases Where They Are Subject To The Trial Courts' Review Of The Fairness, Adequacy And Reasonableness Of The Settlement**

As noted above, in *GM Trucks* the Third Circuit expressly held that settlement classes are valid under Rule 23. 55 F.3d at 792-94. In that specific case, however, the appellate court determined that the settlement was not fair and adequate. The Third Circuit's opinion stated that the district court abused its discretion when it relied upon class counsel's representation as to the value of the settlement, overestimated the risk of bringing a class action and establishing the liabilities, and misinterpreted the reaction of the class. *Id.* at 800-01, 804-19. *See Weiss v. Mercedes-Benz of N. Am.*, 899 F. Supp. 1297, 1303 (D.N.J.) (discussing *GM Trucks* decision), *aff'd without opinion*, 66 F.3d 314 (3d Cir. 1995).

It is well-settled that the approval of a proposed class action settlement is committed to the sound discretion of the district court. *See, e.g., Walsh v. Great Atlantic & Pacific Tea Co.*, 726 F.2d 956, 965 (3d Cir. 1983); 7B Charles A. Wright, *et al.*, § 1797.1, at 393-94. Under Rule 23(e), the district court determines whether a proposed settlement is "fundamentally fair, adequate, and reasonable." *Pacific Enters.*, 47 F.3d at 377 (quoting *Class Plaintiffs*, 955 F.2d at 1276).<sup>23</sup> In the words of Senior Judge Pollack, "[t]he ultimate test for the exercise of the Court's discretion in approving a settlement of a class action pursuant to Rule 23 is whether the settlement, taken as a whole, is fair, adequate, and reasonable." *Michael Milken*, 150 F.R.D. at 53 (citing, *inter alia*, *Protective Committee for Indep. Stockholders of TMT Trailer Ferry v. Anderson*, 390 U.S. 414, 424-25 (1968)).<sup>24</sup>

Where (as here) the district court *simultaneously* certifies a class and approves a settlement of the action, "we will *more rigorously* scrutinize the district court's analysis

<sup>23</sup> *See* 7B Charles A. Wright, *et al.*, § 1797.1, at 378 ("In general, the standard used by the courts in evaluating a compromise is that the proposal must be fair and reasonable and in the best interests of all those who will be affected by it."); Marc S. Galanter, *The Federal Rules and the Quality of Settlements*, 137 U. Pa. L. Rev. 2231 (1989).

<sup>24</sup> *See also* Jack B. Weinstein & Karin S. Schwartz, *Notes from the Cave: Some Problems of Judges in Dealing with Class Action Settlements*, 163 F.R.D. 369, 375 (1996) (discussing role of "fairness hearings" in determining whether proposed settlement is fair, reasonable and adequate); Geoffrey C. Hazard, Jr., *The Settlement Black Box*, 75 B.U.L. Rev. 1257, 1260 (1995) (explicating Rule 23(e) standards for approving settlements).

of the fairness, reasonableness and adequacy of both the negotiation process and the proposed settlement." *Drexel Burnham*, 960 F.2d at 292 (emphasis added). *Accord* *GM Trucks*, 55 F.3d at 805 ("[M]any courts have required the parties to make a *higher showing of fairness* to sustain these settlements.") (emphasis added); *Mars Steel Corp. v. Continental Illinois Nat'l Bank & Trust Co.*, 834 F.2d 677, 681-82 (7th Cir. 1987) ("[W]hen class certification is deferred, a *more careful scrutiny* of the fairness of the settlement is required . . . [T]he district judge [must] conduct a *careful inquiry* into the fairness of the settlement to the class members. . . .") (emphasis added).<sup>25</sup>

Reference to reported cases indicates that the circuit courts of appeals and the district courts have unstintingly carried out their duties to carefully review class action settlements, and have applied the heightened scrutiny required for evaluating the propriety of certifying a class that has been preliminarily approved as a settlement class. *See, e.g., Asbestos Litig.*, 90 F.3d at 974-93 (affirming settlement of asbestos class actions); *DeBoer*, 64 F.3d at 1176-78 (class action lawsuit against bank for overescrowing accounts); *White*, 41 F.3d at 408-09 (professional football players' antitrust class action); *A.H. Robins*, 880 F.2d

<sup>25</sup> *See also* *Weinberger*, 698 F.2d at 73; *In re California Micro Devices Sec. Litig.*, 168 F.R.D. 257, 261 (N.D. Cal. 1996) ("Particular scrutiny is required under [Rule] 23(e) when the proposed settlement has been negotiated prior to class certification. . . .") (emphasis added); MCL 3d, § 30.45, at 243 ("Approval under Rule 23(e) of settlements involving settlement classes . . . requires *closer judicial scrutiny* than approval of settlements where class certification has been litigated.") (emphasis added).

at 748-52 (Dalkon Shield products liability class action); *Weinberger*, 698 F.2d at 73-80 (securities fraud class action); *Beef Indus.*, 607 F.2d at 179-80 (cattlemen's anti-trust suit against beef packer).<sup>26</sup>

In *Chambers Dev.*, Judge Lee recently stated that "[t]he Rand-McNally of class action settlement review," 912 F. Supp. at 836, remains the nine-factor test enunciated by the Third Circuit in *Girsh v. Jepsen*, 521 F.2d 153, 157 (3d Cir. 1975):

- (1) the complexity, expense and likely duration of the litigation;
- (2) the reaction of the class to the settlement;
- (3) the stage of the proceedings and the amount of discovery completed;
- (4) the risks to both sides of establishing liability;
- (5) the risks to both sides to establishing damages;
- (6) the risks of maintaining the class action throughout trial;
- (7) the ability of defendants to withstand a greater judgment;
- (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and

<sup>26</sup> In *Prudential*, Senior Judge Pollack recently stated that the Third Circuit's conclusion that the district court must "assure that settlement classes meet *all* the requirements of [Rule] 23(a) and (b)," *GM Trucks*, 55 F.3d at 797 n.19 (emphasis in original), "merely reflects the practice already employed by this Court." 163 F.R.D. at 205 n.6.

- (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

A similar nine-factor test had previously been adopted by the Second Circuit in *Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974), and has been rigorously applied by trial (and appellate) courts in that circuit, particularly in reviewing settlements of complex class actions arising under the federal securities laws.<sup>27</sup>

In reviewing the fairness, adequacy and reasonableness of proposed class action settlements, trial courts should be permitted to take the *fact* of settlement into account in applying Rule 23's requirements, as the majority of circuit courts have held in numerous cases. The rule adopted by the court below in *GM Trucks* and *Georgine* is misguided because it "require[s] a court to ignore important and relevant information that sits squarely in front of it when deciding whether to certify a settlement class." *Asbestos Litig.*, 90 F.3d at 975. For example, trial courts should be allowed to consider the fact that settlement negotiations occurred at arm's length between experienced counsel who are well aware of the risks inherent in

<sup>27</sup> See, e.g., *Drexel Burnham*, 960 F.2d at 292-93; *Prudential Sec.*, 163 F.R.D. at 209-10; *Michael Milken*, 150 F.R.D. at 52-54, 64; *Chatelain*, 805 F. Supp. at 213. See also *MCL 3d*, § 30.42, at 238-40 (elucidating role of district court in approving class action settlement under Rule 23(e); 7B Charles A. Wright, et al., § 1797.1, at 395-416 (analyzing factors to be considered by district courts in reviewing class action settlements); *id.* at 386-90 & n.7 (collecting cases in which securities fraud class action settlements were or were not approved by trial and appellate courts).

litigation and are knowledgeable about the facts of the particular case and the applicable law.<sup>28</sup> However, the alternative procedure adopted by the court below requires the district courts to address a hypothetical contested case that does not exist, rather than the actual case before the court.<sup>29</sup>

Moreover, the rule adopted by the Third Circuit in *GM Trucks* and *Georgine* is not based upon any sort of factual showing that the rule followed in other circuits (where the fact of settlement is taken into account in determining if Rule 23's requirements have been met) means that district courts are failing to discharge their duties under Rule 23(e) or that unfair, inadequate, or unreasonable settlements are being approved in the federal courts. If anything, the circuit and district court

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<sup>28</sup> In reviewing class action settlements pursuant to Rule 23(e), trial courts have often employed a presumption that a settlement is fair, adequate and reasonable because it is the product of arm's-length negotiations conducted by experienced counsel who are fully familiar with all aspects of class action litigation. *See, e.g., Prudential*, 163 F.R.D. at 205 ("[A] settlement class is appropriate because there is no likelihood of abuse, and the settlement is fair, reasonable and has been arrived at pursuant to informed arm's-length negotiations under the supervision of the Court."). *Accord Lake v. First Nationwide Bank*, 900 F. Supp. 726, 732 (E.D. Pa. 1995) ("Significant weight should be attributed 'to the belief of experienced counsel that settlement is in the best interest of the class.'") (citation omitted); *MCL 3d*, § 30.43, at 241-42 (same).

<sup>29</sup> *Cf. Michael Milken*, 150 F.R.D. at 53 (" 'In evaluating the proposed settlement, the Court is not to compare its terms with a hypothetical or speculative measure of a recovery that might be achieved by prosecution of the litigation to a successful conclusion.' ") (citation omitted).

opinions cited in this brief demonstrate that the opposite is true.

If affirmed by this Court, the decision of the Third Circuit in this case may effectively preclude settlement of complex cases, a result which cannot be squared with the language of Rule 23, much less the philosophy of practical application underlying its adoption, or the strong public policy encouraging settlement of complex cases in general and class actions in particular.

### III. CONCLUSION

For the reasons stated herein, the decision of the court below should be reversed.

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Respectfully submitted,

MILBERG WEISS BERSHAD  
HYNES & LERACH LLP  
KEVIN P. RODDY  
*Counsel of Record*  
355 South Grand Avenue  
Suite 4170  
Los Angeles, CA 90071  
Telephone: 213/617-9007

CLINTON A. KRISLOV  
ROBERT J. STEIN, III  
KRISLOV & ASSOCIATES LTD.  
222 North LaSalle Street  
Suite 810  
Chicago, IL 60601-1086

MERN HORAN  
Executive Director  
NASCAT  
317 Massachusetts Ave., N.E.  
Suite 200  
Washington, DC 20002

Counsel for *Amicus Curiae*  
National Association of Securities  
and Commercial Law Attorneys  
(NASCAT)